



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. E384 OF 2021**

**DIRECTLINE ASSURANCE CO. LIMITED.....APPELLANT**

**-VERSUS-**

**JAMES KARIUKI CHIRA.....RESPONDENT**

**RULING**

- 1) The appellant/applicant took out the motion dated 12<sup>th</sup> November 2021 in which it sought for an order for stay of execution of the ruling, judgment, decree, execution order and all consequential orders arising from the decision delivered vide **Milimani C.M.C.C. no. 9078 James Kariuki Chira =vs= Directline Assurance Co. Ltd** pending appeal.
- 2) The respondent filed a replying affidavit to oppose the motion. When this motion came up for interpartes hearing, learned counsels were permitted to make oral submissions.
- 3) I have considered the grounds set out on the face of the motion plus the facts deponed in the rival affidavits. I have also considered the competing oral arguments tendered by learned counsels appearing in this appeal.
- 4) It is the submission of the appellant/applicant that unless the order for stay is granted it would suffer substantial loss in that the respondent will not be in a position to compensate the applicant for the loss which may arise upon the sale of the attached goods should the appeal turn successful.
- 5) The applicant offered to provide security for the due performance of the decree and or order as shall be directed by this court. In the oral submissions made by the applicant's advocate, the applicant offered to provide a bank guarantee.
- 6) The respondent on the other hand opposed the application arguing that there was inordinate and unexplained delay in filing the motion.
- 7) It is pointed out that the decision sought to be stayed was delivered on 4<sup>th</sup> June 2021 whereas the instant motion was filed on 15.11.2021. The respondent further stated that he is ready himself to instead provide a bank guarantee for the balance of ksh.231,172/=-.
- 8) The principles to be considered in determining an application for stay are clearly set out under Order 42 rule 6 of the Civil Procedure Rules. The first principle is that the application for stay must be filed without unreasonable delay. It is clear from the material placed before this court that the decision sought to be impugned on appeal was made on 4<sup>th</sup> June 2021, while the instant motion was filed on 12<sup>th</sup> November 2021. I find the delay to be long but not inordinate.
- 9) The second principle is that an applicant must show the substantial loss it would suffer if the order for stay of execution of the decree is denied. In this case the applicant has specifically stated that should the appeal succeed, the respondent will not be in a position to compensate the applicant for the loss incurred if the attached goods are sold in satisfaction of the decree.
- 10) The respondent did not respond to the assertion but he instead offered to provide a bank guarantee for the decretal sum.
- 11) In my view the respondent failed to discharge the burden of showing that he is in a financial position to refund the decretal sum should the appeal turn successful. I am convinced that the applicant has shown the substantial loss it would suffer if the order for stay is denied.
- 12) The final principle is the provision for security for the due performance of the decree. The applicant has offered through its advocates by oral submissions to provide a bank guarantee. In the application, the applicant has clearly stated that it is ready to comply with any conditions set by the court for the due performance of the decree.

13) In the end, I find the applicant's motion dated 12<sup>th</sup> November 2021 to be meritorious. It is allowed. Consequently, an order for stay of execution of the decree pending appeal is granted on condition that the appellant/applicant deposits the decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 45 days from today's date. In default the respondent will be at liberty to execute. Costs of the motion to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> and Applicant

..... for the Respondent